

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION**

SENTINEL TRUST COMPANY,  
Danny N. Bates, Clifton T. Bates,  
Howard H. Cochran, Bradley S. Lancaster,  
and Gary L. O'Brien

*Plaintiffs*

Civil Action No.:

v.

KEVIN P. LAVENDER, Tennessee Commissioner  
of Financial Institutions

*Defendant*

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**COMPLAINT FOR INJUNCTIVE RELIEF**

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1. This action for Injunctive Relief is brought pursuant to Title 42, United States Code, Section 1983, to redress and to prevent the further deprivation, under color of state statutes, regulations, custom and usage, of rights, privileges, and immunities secured by the Constitution and laws of the United States. Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1343(a)(3). To such extent as may be necessary to do complete justice, and in the event the Court shall deem it appropriate to exercise its pendent jurisdiction, the secondary relief of declaratory judgment is sought under 28 U.S.C. Section 2201.

2. This action is brought against the defendant in his official capacity as Tennessee Commissioner of Financial Institutions, in which capacity he is Tennessee's controlling executive exercising all powers of the Tennessee Department of Financial Institutions. As such he is vested with administrative oversight over many types of financial businesses from the smallest pawn

brokers and credit unions to the largest banks, and as involved herein, he is empowered to enforce the Tennessee Banking Act, codified as Title 45, Tennessee Code Annotated (hereinafter, T.C.A.), Chapters 1 and 2. The said Act has long had provisions concerning the Commissioner and some subordinates, including bank examiners, other provisions concerning banks, others concerning trust companies, and others concerning banks with fiduciary powers.

3. By common law and now by statutes, the principal characteristic of a bank has been, and remains, that it accepts deposits creating the debtor-creditor relationship, against which the depositor-creditor can draw checks that the bank must honor and pay when presented, charging the same off against its debt to the depositor. However, each bank may invest all of such borrowed moneys in its pool of funds, without sharing its profits with depositors and without any obligation to account to them therefor, although every bank is under the obligation to immediately pay to every depositor, upon demand, the balance of the "debt" in his Account. To assure cash liquidity against cash-flow problems, the deposits of all Tennessee banks are necessarily insured by the Federal Deposit Insurance Company (herein, F.D.I.C.), and all such banks are required to maintain cash reserves as established under Federal Reserve Act provisions, 12 U.S.C. § 461(b)(2) and (c)(1).

4. By contrast, under Tennessee law, by common law and now by statute, the principal characteristic of a trust company is and has always been, that it does not accept or hold any deposits, is not insurable by the F.D.I.C., but that all moneys in its pool of funds held in its fiduciary status are held and banked in its separate fiduciary bank account or accounts, which are the exclusive property of trust beneficiaries, and in which it has no proprietary interest except for the right to withdraw, at intervals, such fees and trust expenses whose withdrawal is authorized by trust indentures. Every such corporate fiduciary is and always has been required to avoid mingling its own proprietary funds with trust funds by keeping its propriety funds in separate bank accounts. In recognition of the fact that such trust funds are the property of trust beneficiaries or settlors, as owners rather than creditors, in the event of insolvency of a fiduciary, such trust funds are not subject to the powers of officials enforcing the rights of either the fiduciary or its creditors, *Caplin, Trustee, v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972), with Tennessee in accord, *Wagner, Trustee v. Citizens' Bank & Trust Co.*, 122 Tenn. 164, 122 S.W. 245 (1909).

3. As shown in greater detail below, this action is brought by Plaintiff Corporation

(herein, Plaintiff or Sentinel), Danny N. Bates, its president and controlling stockholder, and all individual plaintiffs as members of its board of directors, to enjoin and to bring to an end all attempts by Defendant, acting under color of the laws of Tennessee for the knowing, conscious, openly admitted and continuing purpose of destroying the business of Sentinel. From and after May 18, 2004, Defendant Commissioner has pursued and continues pursuing such objective without due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, under the pretense that Sentinel is a bank, when it has never been a bank but only a trust company, and by Defendant's baseless assumption that Sentinel had become insolvent, when there is no rational factual basis therefor as shown below.

4. In so acting as alleged in the preceding paragraph, Defendant has taken and deprived Plaintiffs of their possession and control of Sentinel's valuable property and continuing business, being primarily that of an indenture trustee under over 200 bond indentures held by the general public throughout the United States, a business reasonably evaluated at approximately \$4,000,000.00. Plaintiff serves about 8,000 registered bond-holders, being probably under 20% of its business, with most bonds being held in registered steet name on the books of Depository Trust Company, to which Sentinel distributes bond-debtor payments for owners known only to that company. Until its seizure by Defendant, Sentinel serviced about \$550,000,000 in indentured bond issues with over \$300,000,000 of the bonds being tax-supported municipal bonds, mostly of Tennessee municipalities. Defendant is in the process of destroying such business as rapidly as he can and without due process of law in the following respects, *inter alia*:

(i) Under color of law, Defendant seized possession and control of Sentinel's entire business by force of arms (aided by armed law-enforcement officers), without affording a prior adversarial hearing, under the false pretense that said trust company was a state bank, while admitting in his official documentation that Sentinel is a *non-depository* trust company; he claims no legal authority for such seizure without prior administrative due process hearing other than that provided by T.C.A. § 45-2-1502(c), which purports to empower him to "take possession of a state bank without a prior hearing." upon finding that "an emergency exists which will result in *serious losses to the depositors*, . . . ." (Emphases added).

(ii) Under color of law, Defendant Commissioner has proceeded toward achieving

his objective of destroying the business of Sentinel Trust Company, without convening any meaningful hearing (with dispositive Tennessee law actually noticed and followed to determine if his actions were lawful) before the final destruction of such property rights, and with no timely state remedy possible under the present circumstances as shown below.

(iii) Under color of law, he is proceeding also to destroy the substantive rights of all trust settlors (the bond issuers) under the indentures appointing Sentinel as trustee, paying agent, and/or registrar, as to each of which issue the bond issuer has the absolute contractual right to remove Sentinel and appoint a qualified substitute bank or trust company as successor trustee, and Defendant has from the beginning publicly threatened that he would convert trust funds to his use, as needed, in defraying the costs of the receivership he has imposed, all of which bond issuer and bondholder rights Sentinel is obligated to attempt to protect under each of the bond indentures. He ordered all cash in Sentinel's pooled trust funds segregated, when they were designed to be augmented by collections and further payments from bond-issuers to furnish adequate funds for semi-annual distributions to bond-holders. He thus converted this cash credit, initially totaling around \$2.5 million, to be held subject to his administrative expenses.

5. By such aforesaid actions, Defendant Commissioner, acting under color of law, has violated the following substantive constitutional rights of each of the Plaintiffs:

(i) He has seized Sentinel's property, being its real properties on which its offices are situated, has searched, seized, and assumed exclusive control of all its records, its papers and computers, and has seized control of all its bank accounts, both Sentinel's own and those held by it in its fiduciary capacity, without probable cause and without presenting any warrant issued by any magistrate;

(ii) He has substantially interfered with Sentinel's rights to representation by counsel as a part of its right to meaningful due process hearings, by claiming the ownership and power to exclusively control all of Sentinel's attorney-client confidentiality rights, to prohibit them from communicating with Sentinel's present counsel employed to defend it against Defendant's use of his powers and official influence to attack and destroy it, and Sentinel's former attorneys and accountants within Tennessee have respected and deferred

to this ban;

(iii) He used the powers or influence of his office to impel all banks in which Sentinel has its own and its fiduciary accounts to recognize that he has the exclusive power to control all such accounts, without the issuance of the writ of attachment, sequestration, or any other judicial writ to authorize such seizure and control;

(iv) He, as a member of the Executive Department of the State of Tennessee, has claimed and exercises the power to seize Sentinel's property and business, to appoint a receiver to control it and to conduct its trust business, to make the determination to liquidate such business, and to exercise not only its proprietary and managerial powers, but also its trustee status, its paying agent status, and its transfer agent status, each contractually created by bond indentures, over specific objections that such exercises of power are contrary to the law of the land in Tennessee because, *inter alia*,

(a) the power to seize and control businesses through the appointment and direction of receivers has always been a Tennessee judicial power exercised most commonly under general creditors' bills, but also upon occasion in corporate and contract disputes and as an adjunct to the administration of estates, and the Constitution of Tennessee, by Article II, Section 2, explicitly prohibits any member of the Executive Department of Tennessee's Government from ever exercising "any of the powers belonging to . . ." the judiciary;

(b) the power to impair the obligations of contracts, including the vested contractual rights which Sentinel is obligated to protect, in its own right and obligation to act as trustee, paying agent, and registrar, which power of impairment is denied to all Tennessee's officers by the Constitution of the United States, Article I, Section 10, and by the Constitution of Tennessee, Article I, Section 20, and Article XI, Section 16; and

(c) the power to seize private property for state use without just compensation, which action by Tennessee and its officers acting under color of their offices and authority is prohibited by the Constitution of the United States, Fifth Amendment and Fourteenth Amendment, Section 1 and by the Constitution of Tennessee, Article

I, Section 8 and Article XI, Section 16.

6. Although, as alleged below, there are statutory provisions purporting to authorize the Tennessee Commissioner of Financial Institutions to exercise such powers of seizure, receivership imposition, and liquidation upon **state banks**, when a Commissioner seeks to exercise such powers over a trust company lacking banking powers and privileges, such attacks are particularly difficult for a trust company to defend against because in a very real sense under the customs of state government, the banking industry is the constituency of the Commissioner of Financial Institutions. First, the Commissioner is required by law to be experienced in the banking industry, hence Tennessee's banking industry. Second, any incumbent in such office is apt to gain experience of great value in enhancing the marketability of his own knowledge and connections for return to the Tennessee banking business with greater career opportunities upon the termination of his incumbency as a political appointee; Third, instead of being supported solely by public taxation and appropriations, the Tennessee Department of Financial Institutions is supported by large annual assessments against each bank, subject to some discretionary control by the Commissioner of the said department, this promoting a tendency toward an unavoidable symbiotic relationship between the said Department and the industry it controls, due to the banking industry's command of wealth and power to influence legislation. Against such powers and apparent relationships, a competing trust company without banking powers and influence is comparatively helpless and is a natural target for take-over by the banking industry.

7. The legal background within which this case arose concerns the Tennessee Banking Act which Defendant Commissioner is empowered to enforce, as to which the statutory mode of enforcement, regardless of the county in which the bank or trust company is situated, is to file a complaint for injunctive relief in the Davidson County Chancery Court, T.C.A. § 45-1-107(a)(6). Other statutory provisions, T.C.A. §§ 45-2-1502 and -1504, empower him to seize and liquidate a state bank without prior hearing if he determines an emergency renders this essential to avoid losses to the bank's depositors. These destructive actions of seizure, determination to liquidate, and proceeding to liquidate can be made and carried out by the Commissioner alone, and the objecting "state bank" is entitled to review by *certiorari* in the Davidson County Chancery Court, as advised by Defendant Commissioner in his orders. However, these statutes require the Commissioner to file a copy of any such charges with the chancery clerk and master in the county of the bank's situs, and

while not requiring the commencement of any litigation and not providing for any process, the statutes require him to submit for approval to that chancellor, a list of particular decisions. By T.C.A. § 45-2-1502(c)(2), the Commissioner is empowered, "with *ex parte* approval of the court in which the notice of possession was filed, sell all or any part of *the state bank's assets* to another state or national bank or to the Federal Deposit Insurance Corporation." (Emphases added). The language of such sections does not contain any provision purporting to authorize the Commissioner to seize and use property held in trust by such a state bank, and no provision states that these bank-liquidation powers may be exercised against trust companies of any non-bank companies, although these specific powers are definitionally broadened by T.C.A. § 45-1-103(3), providing, "for the purposes of *supervision, examination and liquidation*, ["bank"] includes industrial investment companies and industrial banks . . ." (emphasis added). However, there is no comparable statutory provision explicitly empowering the Commissioner to exercise these bank-liquidation powers over a trust company.

8. Sentinel's mode of handling trust funds was precisely identical to the mode followed by the trust department of banks having fiduciary powers (described *infra*, Paragraph 9), which it followed for many years without any objections by incumbent commissioners in handling the funds on more than 200 bond issues. Sentinel's obligation to make distributions under the various bond indentures arose only from the actual receipt of the required amount of debt-service funds from the bond issuer. A substantial number of these issues were tax-exempt special-purpose revenue bonds, issued under the sponsorship of municipalities and counties of states other than Tennessee, many being hospitals and other such health-care institutions. Financial problems surfaced during the years 1999-2000, after statutory changes in Federal Medicare reimbursement procedures caused delayed payment, resulting in cash-flow problems among such bond-issuing health-care facilities. This caused many bond issues trustee by Sentinel to go into default on their bond obligations. The defaults obligated Sentinel, under the terms of each bond indenture, to take legal collateral-enforcement actions against all such issuers. The defaults were those of the bond-issuers, not of Sentinel.

9. As do all bank trust departments and trust companies that are subsidiaries of a bank holding company, in serving as indenture-bond trustee Sentinel received millions of dollars in the form of cash equivalents, being wire transfers and bond-issuer checks, which it deposited in its trust

bank accounts principally in SunTrust Bank, Nashville. Most trustee issues paid in monthly instalments, each 1/12th of the annual principal and interest (hereinafter, P&I) obligations for that bond year, and in others, as to which it acted only as paying agent (mostly municipalities whose taxing powers were pledged), in much larger amounts for each half-year, received within days before the bond-holder payment dates, when Sentinel mailed checks to the bondholders of such issue. On most trustee bond issues, Sentinel also held larger amounts in special funds held in securities for the usually 10- to 30-year term of the bond issues. While held in Sentinel's name as fiduciary on SunTrust books, Sentinel books always showed each security and each monetary amount, both deposits, interest earned, and disbursements therefrom, in the name of the individual bond fund for whose bond-holders they were held in trust. To properly assure the protection of each beneficiary's rights, for each month, Sentinel computed the average daily interest-earning rate as supplied by bank Statements, and credited this for the number of days to the cash holdings in each bond fund, accurately recording the moneys owned by each such fund.

10. With bank trust departments holding large amounts of money unused (except for the earning of low bank-rate interest), such trust departments are free to use, such moneys temporarily in paying their administrative expenses. This practice is specifically recognized and authorized as lawful for bank trust departments and trust companies owned by bank holding companies by T.C.A. § 45-2-1003(c), which provides as to every such fiduciary institution that such trust moneys "may be used in the conduct of its business . . ." These bank privileges are definitionally made available to all non-depository trust companies as well, for the limited purpose of the aforesaid section and other specific sections related to corporate fiduciary business (T.C.A. §§ 45-2-1001-1006) by T.C.A. § 45-2-1001(c)(1), which provides, in part, "A bank authorized to act as a fiduciary (which term includes a trust company, for the purposes of this section and §§ 45-2-1002--45-2-1006) . . ."

11. Such use of trust funds is further supported and encouraged by Tennessee statutory provisions codified in Title 35, T.C.A., which governs corporate fiduciary practices of both trust companies and banks with fiduciary powers, and which chapter is not subject to the Defendant Commissioner's enforcement powers. The provisions thereof are enforceable by Tennessee's Chancery Courts, and one such provision, T.C.A. § 35-3-117(j)(1)-(3), limits the fiduciary's liability to the amount needed to restore to beneficiaries the total amounts by which benefits paid to them have been missed or diminished, *after deducting* from the future entitlements of other beneficiaries

reimbursement for any excessive benefits they may have received. In actual practice, with bond indenture trustees receiving many millions of dollars annually, with disbursements required only semi-annually on each bond issue, and these payment dates staggered in different months throughout every year for different issues, there is little danger that such borrowings could ever cause an actual cash-flow problem. If such a problem should occur, it would be instantly obvious to the fiduciary by comparing its schedule of payments with its bank balance, and it could recognize such liability and inject additional funds from its own capital or by short-term borrowing.

12. As alleged above, upon the occurrence of bond-issue defaults, Sentinel recognized its obligation to protect bond-holder's rights through collateral-liquidation proceedings. Each bond indenture required this and authorized the use therefor of cash and other properties, to reimburse the costs in such liquidation, and each such indenture gave Sentinel legal priority over the bondholders themselves for reimbursement of unrecovered collection costs and payment of all fees and charges. When disbursements for expenses collateral-liquidation purposes exceed cash in the defaulted account, overdrafts were incurred. Sentinel's standard schedule of fees and charges included an additional charge for any bond-issuer overdrafts, at the rate of  $1\frac{1}{2}\%$  per month, compounded monthly. This charge has been a part of Sentinel's fee-and-charges schedule since the 1980s, and it is designed to prevent any loss to non-defaulting bond funds, with profits, if any, to be pro-rated among the bond funds. Because of the legal priority of bond-indenture claims in all liquidation proceedings, Sentinel's directors considered such overdrafts a prudent step in converting the defaulted bond-issuers' collateral into cash. This is because the compounding effect would more than double the bond-issuer's liability in about 4 years, triple it in less than 6 years, and quadruple it in less than 8 years, believed by them to be an adequate period of liquidation litigations. These and related facts as alleged herein are elaborated in the supporting affidavit filed herewith, executed by Robert V. Whisenant, CPA, CVA, President-Elect of the Tennessee Society of Certified Public Accountants (hereinafter, "Whisenant Affidavit").

13. After commencement of the aforesaid defaults, Sentinel vigorously pursued the defaulted bond-issuers' assets in litigations, debiting the affected accounts to pay attorney fees and other litigation costs, but always crediting each bond account with its proper amount of earned interest with the receipt of each bank statement from SunTrust, and accruing the large compounding claims for reimbursement against all of the defaulted issuers whenever one of those account's funds

were depleted, causing it to go into overdraft status. As a consequence, there were never any missed or reduced payments to any bondholders of any bond issue not in default. Therefore, the conditions never occurred under which Sentinel could incur liability under T.C.A. § 35-3-117(j).

14. In its enforcement activities, Sentinel recovered millions of dollars, and each such recovery was assigned to the bond issue to which it pertained, as were all the compounded charges and all monthly earnings on non-defaulted bonds. In relation to each defaulted bond issues, all recoveries were utilized first for the payment of liquidation expenses, charges and fees, reducing or eliminating negative balances of "overdrafts," with the balances pro-rated among and in some cases fully paying the issue's bondholders. By the time Defendant Commissioner claimed and exercised his bank-seizure and -liquidating powers over Sentinel beginning in May, 2004, Sentinel had completed collections on all but 13 defaulted bond issues, resulting in distributions to defaulted-issue bondholders of over \$66,000,000. Sentinel merely posted its earned fees on defaulted issues as paid, but withheld paying itself any fees on any defaulted issues pending completion of its liquidation litigations. When such completion shall occur, it will only then become possible to determine whether Sentinel might have any liability, e.g., whether there is actually a shortage or overage in the collective amount of money in the pooled trust funds.

15. As shown below (*infra*, Paragraph 19), Sentinel was not subject to the Tennessee Banking Act nor to the Commissioner's regulatory authority until July 1, 1999, and from that date through June 30, 2002, examinations of Sentinel's business were conducted by examiners of the Department of Financial Institutions at the said Department's pleasure, at Sentinel's expense. With full access during the entire period to all of Sentinel's records, papers, computer system, and premises, the examiners observed Sentinel's entire method of doing business, including overdrafts in defaulted bond accounts, its meticulous record keeping, and its application of charges. At no time did Defendant Commissioner's predecessor in office, communicate to Sentinel or its officers any assertion that its temporary overdrafts were illegal, forbidden, or disapproved by the Department, such operational method being made lawful for bank trust departments and bank-owned trust companies by T.C.A. § 45-2-1003(c). Sentinel made a written report to the then-Commissioner on April 16, 2003, describing its use of pooled funds to fund the costs of enforcing bondholder rights, and recognizing that it would be responsible for any resulting shortfall.

16. Defendant Commissioner served charges and a cease-and-desist order on Sentinel on

May 3, 2004 (Copies attached hereto, Exhibit A), which order required the infusion of an additional \$2 million into Sentinel, and Defendant Commissioner seized possession of Sentinel's offices, real estate, its individual and fiduciary bank accounts on May 18, 2004 (Notice of Seizure, Exhibit B hereto), simultaneously appointing a receiver, and ordered its liquidation on June 18, 2004 (Notice of Liquidation, Exhibit C hereto), clearly stating his claim of power and intent to utilize bondholders' trust funds, if necessary, to pay the costs of receivership and liquidation. He has since proceeded deliberately with his liquidation plans and has at all times asserted his position that he is empowered to use trust funds for public purposes, though these are not the property of Sentinel.

17. From and after the date of seizure of its property and business, May 18, 2004, Sentinel has had no access to its records, but on the date of Seizure, at Defendant Commissioner's demand, Sentinel's President Bates estimated the total of fiduciary overdraft at about \$7.25 million, a considerable portion of which was compounded interest. The Commissioner's actions have been taken on the mistaken belief that this account is a liability of Sentinel, when in fact it is an asset of Sentinel in its fiduciary capacity which, as shown by the aforesaid Whisenant Affidavit, which could lead to a liability under T.C.A. §§ 35-3-117(j) upon completion of all liquidations. Since seizure, Sentinel has determined that as of the time of the last adequate records available to its officers, the overdrafts within that receivable account as of the end of March, 2004, was \$3,167,678. As established by the Bates affidavits identified and filed as attachments to the Whisenant Affidavit, this amount did not present any cash flow problem, because it was covered by the ordinary large cash flow-through, plus over \$2.6 million in fees that had been credited and charged off as paid, but which cash had not actually been withdrawn by Sentinel. Sentinel had refrained from withdrawing such fee entitlements to assure adequate liquidity of the pooled trust funds to meet all individual fund obligations to bondholders. Although Defendant Commissioner assumed Sentinel was insolvent at the time of the seizure, it in truth was solvent and there was no basis for assuming it was insolvent, as proven by the aforesaid Whisenant Affidavit filed herewith. As further demonstration, since his seizure of Sentinel, the Defendant Commissioner has reported collateral collections of \$3,600,000 from defaulted issues in overdraft status.

18. When Defendant Commissioner seized Sentinel, it was a valuable going business. It had in hand contracts to serve as bond trustee on three new municipal bond issues to be closed within the following two weeks, which would have generated almost \$100,000.00 in income. It had

on its books over 200 bond issues under which it served as Trustee and/or Paying Agent and Registrar, which would generate precisely calculable income (under agreed rates) of over \$15,000,000 over time, which Sentinel had computed at the end of 2003 (a computation it does at the end of every year) with realistic discounting, as having a market value of around \$4 million, should Sentinel have the opportunity to sell its business plus its valuable real property. However, there is no possibility that the Defendant Commissioner's liquidation sale will produce more than a small fraction of its market value. This is true because every bond indenture appointing Sentinel retains to the issuer the absolute right to remove any trustee and appoint a substitute trustee or paying agent/registrar without cause at its pleasure, and any prospective buyer—which by statute can include only banks or other trust companies—will know that every bond issuer will have the right to appoint a substitute trustee and will likely have little motivation to accept a trustee forced upon it without its consent and in lieu of Sentinel as the trustee of its choice.

19. Such destructive actions have been taken and are being aggressively pursued by Defendant Commissioner with knowledge—as admitted for him and in his presence by his attorney, on the staff of the Attorney-General of Tennessee, speaking in open Court—will have the end effect of destroying Sentinel Trust Company. All such actions and notices by Defendant are posted on his web site, <http://www.state.tn.us/financialinst> to give public notice, particularly to the investment, brokerage, bond counsel, and related occupations. He has invited banks to furnish qualifying information so they may examine “bid packages” by communication on his web site, and it is alleged upon information and belief that a few banks have indicated an intent to bid and have been invited to Sentinel's Nashville office during the current week to examine all the confidential “bid packages” and all of Sentinel's records they desire to examine. Defendant Commissioner has openly stated his plans, through both his own counsel and private counsel for the receiver he appointed, to rapidly sell Sentinel's fiduciary business and accounts to the highest bidder and to submit the same for approval to the Chancery Court in Hohenwald, Lewis County, Tennessee, the situs of Sentinel's principal office.

20. The only basis for such claim of power, is T.C.A. §§ 45-2-1502 and 45-2-1504, which by their literal terms purport to grant him this power to liquidate only “state banks,” and also provide that such bank-asset sales are subject to the *ex parte* approval of the chancery court of the county of the bank's situs. There is no Tennessee statute (i) defining “banks” as including “trust

companies" within the Banking Act except for such definition pertaining to the use of "banks" solely in T.C.A. §§ 45-2-1001-1006, relating to the fiduciary trustee business; (ii) no statute purporting to vest him with power to remove trustees, which power, to the limited extent that Tennessee legislation has created it, is a judicial power vested in the chancery courts under T.C.A. Title 35, pertaining to trusts and corporate fiduciaries, including both banks and trust companies; and (iii) no Tennessee statute purporting to empower him to remove, or to assume the functions of contractually-appointed paying agents and bond registrars. Yet he has assumed for himself and assigned to his appointed Receiver—for which appointment no judicial approval was required—the functions of trustee, paying agent, and bond registrar. He has expressed his intent to so sell Sentinel's fiduciary accounts, and thereby complete the destruction of its business, before the end of September, 2004.

21. Regarding the statutes purporting to empower Defendant Commissioner to seize banks, the statutes require very limited approvals by the Chancery Court in the county of the bank's situs, limited to the approval of the Commissioner's decisions to sell any and all assets of the bank, the approval of his decision to compromise any claims against the bank over \$500.00 and of his decisions to pay any claims against the bank, T.C.A. § 45-2-1504(a), with no statutory provision for the said Chancery Court to have any supervisory authority over the administration of the receivership. Plaintiff Sentinel appeared in that Court, stated its position that all seizure and liquidation activities were unauthorized by law, but that the jurisdiction to determine this issue was part of the *certiorari* case in Davidson County, the Attorney-General concurred in such jurisdictional position, and the Lewis County Chancery Court accepted it.

22. Being advised that there is judicial authority encouraging District Courts to abstain from granting relief to enforce rights under 42 U.S.C. § 1983, the allegations of this paragraph are made to demonstrate that, inasmuch as the plain language of T.C.A. §§ 45-2-1502 and -1504 purports to grant the seizure and liquidation powers for use only against state banks, there has been no textual change in the statutes to empower Defendant Commissioner to exercise such powers against non-bank trust companies. Although the identification of the controlling body of state law is unquestionable (being Tennessee's law of statutory construction, for determining whether the text of any statute has been amended by implication) and its content is clear, there is in fact no Tennessee remedy in existence providing a meaningful hearing with decision actually determinable by the law of statutory construction to timely make final decision on whether Defendant Commissioner is

lawfully empowered to so liquidate and destroy the business of Sentinal Trust Company, so as to avoid the Defendant's taking of Sentinel's property without due process of law. The foregoing assertion is accurate because:

(a) The Tennessee statutory remedy for such usurpations or extensions of power to subjects to which they do not pertain is the writ of *certiorari*, usually issued *ex parte*, to remove proceedings into a Chancery Court from an inferior jurisdiction—a state, county, or city board or official making quasi-judicial determinations affecting rights—where the decisions may be reversed, and the rapid issuance of the writ of *supersedeas*, after hearing, to nullify administrative orders, having the effect of an injunction. Such are adequate remedies, but only if the trial court recognizes the illegality of such conduct and nullifies it. This is proven by Tennessee judicial experience—at a time when the Commissioner of Insurance (predecessor to Defendant's powers in the state structure, in which the Department of Insurance and Banking formerly included bank regulation under a divisional officer, the Superintendent of Banks) exercised a corporation-destroying power which the trial court refused to block in the *certiorari* review; the state's Supreme Court applied the statutory construction rule that a state official has no powers but those granted by statute, and if a statute does not grant the power, then the power does not exist; but the Supreme Court went on to hold that since the illegal exercise of power had already destroyed the corporation, an order pursuant to *certiorari* could not possibly re-constitute the company, so the unremedied illegal executive action, by then having accomplished its purpose, rendered the case moot, *Boyce v. Williams, Commissioner of Insurance and Banking*, 215 Tenn. 704, 713, 389 S.W.2d 272, 276 (Tenn., 1965).

(b) Plaintiffs sought resort to state remedies by obtaining the writ of *certiorari*, and petitioned for *mandamus* in support of the Court's *certiorari* jurisdiction to terminate the Defendant's liquidation activities while awaiting an expedited hearing on their application for *supersedeas* to nullify the Commissioner's allegedly illegal orders. The chancellor transferred the case by interchange for hearing by a Circuit Judge, and arguments were heard, with copies limited portions of the transcript thereof attached hereto as Exhibit D, showing that the Court comprehended the statutory construction principles, that Defendant Commissioner conceded and the Court recognized that the intent and

consequence of a continuation of his liquidation efforts, absent the grant of *supersedeas*, would be to destroy Sentinel's business. However, the Court denied the application for *supersedeas* by an unappealable interlocutory order whose rationale, as set out in greater detail in Sub-paragraphs (c) and (d) below, adopted for the statutes a meaning by enunciating rationale which, Plaintiffs insisted and still insist, refused to recognize or follow any part of Tennessee's law of statutory construction, leading Plaintiffs to exhaust all possible routes for a state judicial remedy as shown by Sub-paragraph (e) below.

(c) State trust companies had been subject to the Tennessee Banking Act since a 1980 amendment thereof, which exempted from its application all trust companies previously granted corporate charters granting such powers, with Sentinel being such an exempted company. In 1999, the Legislature again amended the Banking Act to bring the previously-exempted companies under it by Chapter 112, Public Acts of 1999, no provision of which explicitly stated that it enlarged, changed or affected the powers the Commissioner was already empowered to exercise over trust companies, except for one provision, codified as T.C.A. § 45-1-124(h), which empowered him to exercise over newly subjected trust companies his powers of examination, with no mention of his bank seizure and liquidation powers, for the limited period of July 1, 1999 through June 30, 2002, by stating, "During this period of time ['period shall not exceed three (3) years from July 1, 1999.'], . . . the commissioner may conduct examinations at such company's expense, and apply the requirements of chapters 1 and 2 of this title as deemed appropriate." The commissioner had insisted that his powers of seizure and liquidation of banks were extended to empower him to liquidate trust companies by a single sentence which brought trust companies under the Banking Act, codified in T.C.A. § 45-1-124(b), which stated that "Unless the commissioner determines otherwise, the provisions of chapters 1 and 2 of this title, and the rules thereof, shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers." The Court's stated rationale merely accepted the Commissioner's position that such isolated excerpts extended the Commissioner's statutory powers instead of analyzing all relevant statutory provisions.

(d) In seeking either a modification of this order or an interlocutory appeal,

which a Tennessee trial court may grant subject to the appellate court's acceptance thereof, Plaintiffs insisted, in part, that the Court's memorandum "conclusively establishes that its conclusion was not guided by the law of statutory construction, because its [sic.] concentrated on a single sentence and section as contended for by the Attorney-General," and that such rationale did not follow the Tennessee law of statutory construction in that under such law, "(i) all rules of construction must be considered in construing a statute, (ii) ordinary meaning should be given to statutory language, rather than seeking to alter or amend it, (iii) it must be presumed that each word in the statute was used deliberately with each word conveying intent, meaning and purpose, so that the use of particular language in one section but its omission from another must be given its rational effect in determining the statute's effects, and (iv) that no governmental official or entity has any power to control a different such official or entity, and that no governmental official is vested with any powers except as specifically granted by statute." Plaintiffs also insisted that there had been a *stare decisis* determination that laws merely expanding the Commissioner's jurisdiction to cover a new type of business (industrial loan and thrift companies) did not extend the Commissioner's bank regulatory powers, including the power to examine, to authorize him to use these bank-related powers against non-bank companies, *Madison Loan & Thrift Co. v. Neff*, 648 S.W.2d 655 (Tenn.App., M.S., 1982).

(e) The Court took umbrage at Plaintiffs' assertion, dismissing it with the comment that the plaintiffs "remain adamantly convinced that the Court does not understand the rules of statutory construction."—which was inaccurate, because there was no questioning the Court's *knowledge*, but simply a demonstration that the rationale of its memorandum did not *follow* or even *notice the existence* of any rules of statutory construction in enunciating its decision. However, the Court's order did grant an appeal. Four days later, Plaintiffs filed an application with the Court of Appeals to accept such interlocutory appeal, but before passage of time for the Attorney-General to respond, the Court of Appeals *sua sponte* issued its order (Exhibit E) denying the appeal. Hence, there remains no remedy available under Tennessee law to prevent the Defendant Commissioner from exercising his bank-liquidation powers over Sentinel, which is both a non-bank and solvent. Although the order entered is merely interlocutory, and modifiable by the Chancery Court at any time, the possibility of persuading any human mind to abandon an opinion to

which it has firmly committed itself is negligible, and there is no possibility that trial of the merits of the *certiorari* case could result in a favorable decision at the trial or appellate level before Defendant shall have completely destroyed Sentinel and its formerly-prosperous business. However, Plaintiffs are advised that they must continue to prosecute said case as the only possible means of achieving a final judgment, appeal of right, and possible discretionary review by the Supreme Court of Tennessee or the United States Supreme Court.

23. As shown above, Defendant Commissioner has seized and is in the process of destroying Plaintiffs' valuable property rights, and will inexorably proceed to achieve the total destruction thereof without due process of law, in each of the respects alleged in Paragraph 4 above and elaborated in the other allegations of this Complaint, unless this Court shall restrain and enjoin such actions, the total destruction of Plaintiff's business will inevitably be accomplished

24. For the foregoing reasons, being that the Defendant Commissioner is proceeding to speedily destroy Plaintiff Sentinel Trust Company by selling its fiduciary accounts, his *de facto* power to accomplish such result is being recognized despite the lack of valid legal basis therefor, and the absence of any other adequate remedy, so that irreparable injury will result to Plaintiffs before the adverse party can be heard in opposition, unless this Court shall temporarily restrain the Defendant Commissioner, and thereafter issue its preliminary injunction enjoining said defendant, during the pendency of this litigation, from taking any further steps in carrying out the liquidation of said company, including any steps to sell its fiduciary accounts or any of its properties. In support hereof, there is appended hereto the certificate of service of Plaintiff's counsel, in compliance with Rule 65(b)(2), F.R.Civ.P. Plaintiffs aver that inasmuch as Defendant has total control of all said Plaintiff Corporation's assets, including its bank accounts, no injury can result to Defendant from the grant of such injunctive relief, so that only a nominal bond, if any, should be required.

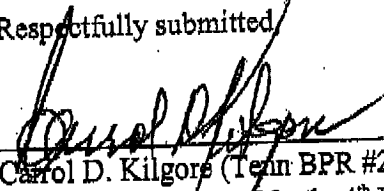
WHEREFORE, Plaintiffs pray:

- 1<sup>st</sup>: That the Court issue its temporary restraining order, restraining the defendant from taking any further steps to carry out the liquidation of Plaintiff Sentinel Trust Company, including any steps taken for the purpose of selling its fiduciary accounts or any of its other properties; and that such order be issued either *ex parte* or by setting a prompt hearing therefore *sua sponte* or upon application from the Attorney-General of Tennessee, notice of the filing of this Complaint having been given to the said Attorney-General.

- 2<sup>nd</sup>: That the Court issue its Show-Cause Order requiring the Defendant to appear at an early date and show cause why he should not be enjoined, during the pendency of this action, from continuing to take any such actions enumerated in the First Prayer hereof; and that after hearing, in view of the lack of any Tennessee statutory provision whose terms empower the Defendant Commissioner to take such bank-seizure and liquidation steps against a non-banking corporation, and due to the lack of any truthful basis for charging that Sentinel Trust Company was insolvent when he seized it and ordered it liquidated, he be enjoined, during the pendency of this action, from continuing his possession and control of Plaintiff Corporation's properties and bank accounts.
- 3<sup>rd</sup>: That upon final hearing of this case, the Court issue a permanent injunction, mandatorily enjoining Defendant to restore full control of Sentinel Trust Company to its Board of Directors, and requiring Defendant, individually and through his staff and appointed Receiver, to make and deliver a full accounting to Sentinel Trust Company and its directors of all moneys of Sentinel Trust Company, and all moneys held in trust by Sentinel Trust Company, converted by and/or under the direction of defendant Director to the uses of himself, his Receiver, and others acting under his direction during the entire period of their control of the properties, business, and moneys pertaining to Sentinel Trust Company.
- 4<sup>th</sup>: That, if the Court deem it appropriate, before or after considering such evidence as may be necessary for the purpose, order the entire trial consolidated with the preliminary injunction hearing as authorized by Rule 65(a)(2), F.R.Civ.P.
- 5<sup>th</sup>: For such further relief as may be warranted, excluding, however, the imposition of any monetary damages against Defendant Commissioner in his official capacity, being the only capacity in which this action is brought against him.

THIS IS THE FIRST APPLICATION FOR FEDERAL EXTRAORDINARY RELIEF IN THIS CAUSE.

Respectfully submitted/

  
Carol D. Kilgore (Tenn BPR #2544)  
227 Second Avenue, North, 4<sup>th</sup> Floor  
Nashville, TN 37201-8801  
Tel. 615/254-8801  
Fax 615/255-5419

### Declaration

Carrol D. Kilgore, Attorney for the Plaintiffs herein, declares that the facts herein cited are as to matters of formality as to which he knows no reason to believe they would be disputed, that all copies of public documents attached as exhibits to the Complaint herein are true and correct copies, that transcript excerpts attached as exhibits are accurately excerpted by block copying from digital copies of such transcripts as furnished by the court reporter, and that the allegations of ¶ 5(ii) of the Complaint, concerning Sentinel Trust Company's former attorneys' and accountant's yielding to the Defendant Commissioner's insistence that they could not furnish me information except by his authorization, as shown by the following-described correspondence: (i) On June 16, 2004, I received a hand-delivered letter from Sentinel's former leading counsel, WALLER, LANSDEN, DORTCH & DAVIS, refusing to allow firm members to furnish me information, which stated in part, that because of Sentinel's seizure, "The Commissioner is therefore, in our view, the only person who may waive Sentinel's attorney-client privileges or authorize us to discuss with outside parties our prior representation of Sentinel." (ii) I wrote to the Defendant Commissioner on June 17, 2004, saying in part, "I respectfully submit that the only proper response that can be made to the Waller-Lansden position by a public official such as yourself is to promptly communicate to such law firm that neither your office nor the receiver has any control whatever over past attorney client communications between the corporation under receivership and its former employed counsel." (iii) The Commissioner, through his staff, refused to relent, and on July 7, 2004, an attorney for Sentinel's former accountant communicated her refusal to sign an affidavit on account of the claimed ownership by the Commissioner of control of Sentinel's professional communication privileges, and the accountant and all Tennessee attorneys formerly representing Sentinel refused to cooperate by refusing to furnish affidavits of information they had initially furnished to me orally. The foregoing declarations are made under the penalties of perjury.

Date: September 15, 2004.

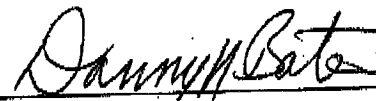
  
Carrol D. Kilgore, Declarant

### DECLARATION

Danny N. Bates, Plaintiff herein, declares, under the penalties of perjury, that the facts stated in the foregoing complaint are true except for those alleged upon information and belief, as to which he has been informed and believes them to be true, and except for allegations of law, which he has been

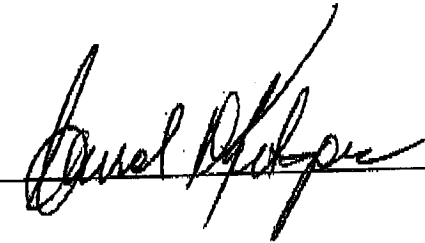
advised and believes to be true, and allegations proven by the declaration of his attorney and those proven by the affidavit of Robert V. Whisenant, filed herewith; and he does reaffirm the truth of the factual statements to which he swore in his previous affidavits filed as attachments to the aforesaid Whisenant affidavit.

Date: September 15, 2004.

  
\_\_\_\_\_  
Danny N. Bates, Declarant

#### Certificate of Service

It is hereby certified that on this September 16, 2004, copies of the foregoing complaint and all documents filed therewith have been delivered to the offices of JANET M. KLEINFELTER, ESQ., Senior Counsel, Financial Division, Attorney-General of Tennessee, 425 Fifth Avenue, North, Nashville, Tennessee 37243.

  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION**

SENTINEL TRUST COMPANY,  
Danny N. Bates, Clifton T. Bates,  
Howard H. Cochran, Bradley S. Lancaster,  
and Gary L. O'Brien

*Plaintiffs*

Civil Action No.:

v.

KEVIN P. LAVENDER, Tennessee Commissioner  
of Financial Institutions

*Defendant*

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**PLAINTIFFS' MOTION  
FOR TEMPORARY RESTRAINING ORDER**

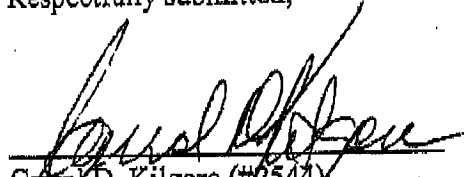
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Having simultaneously filed a complaint seeking a temporary restraining order followed by a preliminary injunction, under 42 U.S.C. § 1983, Plaintiffs respectfully moves the Court to issue such temporary restraining order granting the restraining relief as prayed in the Complaint and ordering Defendant to appear on a day within 10 days thereafter to show cause why a preliminary injunction should not be issued as prayed.

Viewing the Constitutional deprivation as quite clear, although perhaps unique, Plaintiffs submit that the Court can appropriately grant such an order without a prior hearing, to avoid duplicating argument that would be needed upon a preliminary injunction hearing, and that such an order can properly be required without bond or with a nominal bond, for the reasons alleged in the

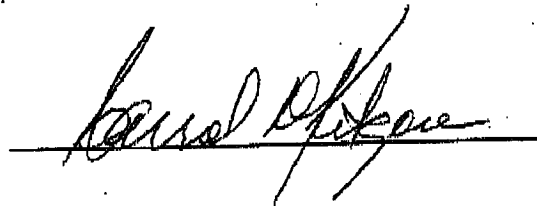
sworn Complaint and supporting affidavits, particularly the affidavit appended to the Complaint labeled "The Whisenant Affidavit," and the copies of the two earlier affidavits by Plaintiff Bates filed in the Davidson County Chancery Court.

Respectfully submitted,

  
Carol D. Kilgore (#2544)  
227 Second Avenue, North  
Nashville, Tennessee 37201-1693  
(615) 254-8801  
*Attorney for Plaintiffs*

**Certificate of Service**

It is hereby certified that on this September 16, 2004, a copy of the foregoing Motion has been delivered to the offices of JANET M. KLEINFELTER, ESQ., Senior Counsel, Financial Division, Attorney-General of Tennessee, 425 Fifth Avenue, North, Nashville, Tennessee 37243, with NOTICE that Plaintiffs have waived oral argument of the Restraining Order Motion unless requested by Defendant and/or ordered by the Court.



**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE,  
NASHVILLE DIVISION**

SENTINEL TRUST COMPANY,  
Danny N. Bates, Clifton T. Bates,  
Howard H. Cochran, Bradley S. Lancaster,  
and Gary L. O'Brien

*Plaintiffs*

Civil Action No.:

v.

KEVIN P. LAVENDER, Tennessee Commissioner  
of Financial Institutions

*Defendant*

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**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION  
FOR TEMPORARY RESTRAINING ORDER**

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In civil rights actions brought under 42 U.S.C. § 1983 against a state official or other person who, "under color of any statute, . . . , custom, or usage, of any State . . . , subjects, or causes to be subjected, any . . . person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," mandating the consequence that the offending official "shall be liable to the party injured in an action . . . in equity, or other proper proceeding for redress . . ." the courts have long recognized that for such a deprivation to occur, there must be an infringement of either life, liberty, or property. When, as here, a state commissioner is sued in his official capacity for prospective injunctive or declaratory relief instead of being sued personally for damages, there can be no valid objection to the Federal Courts' powers to grant relief, *Kentucky State Police v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114, 121 (1985)

The Supreme Court held that under the details of actual state law and custom, there was a real, though rare, property right to the continuation of employment in *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), solely to demonstrate that such destruction of property rights by the use of state power without prior hearing is constitutionally impermissible because "... the right to some kind of prior hearing is paramount." (408 U.S., at 570, 92 S.Ct., at 2705, 33 L.Ed.2d, at 557). Here, the existence of a property right being destroyed is indisputable. Sentinel is a company reasonably worth some \$4 million, and state officials admittedly are in the act of seizing then proceeding to intentionally destroy without furnishing a prior hearing, as a constitutionally-required predicate for such action.<sup>1</sup> The Defendant so acting openly claimed to act under a statute, which says in the plainest possible language that he can do it to an insolvent "state bank." But that statute doesn't say he can do it to a "trust company." He declares that the seizure was necessary to avoid "*serious losses to the depositors, . . .*" (Complaint, ¶ 4(i)), although Sentinel, like every trust company, has no depositors and has never had a depositor.

Thus, the first requirement in a case such as this, that the Section 1983 plaintiff show loss of property, as amplified by *American Manufacturers Mut. Ins. Co. v. Sullivan*, 526 U.S. 40., 59, 119 S. Ct. 977, 989, 143 L.Ed.2d 130, 149 (1999), is indisputably met herein.

This specific right, secured directly by the Due Process Clause of the Fourteenth Amendment, is one whose forfeiture the statute prohibits under the mere "color" of state law—under the pretense that statute actually authorizes seizures—is clearly violated when such law invoked simply cannot

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<sup>1</sup>From the transcript of the expedited *Supersedeas* hearing held August 5, 2004, by Attorney-General Kleinfelter: "There's no 1 question, Your Honor, and we admitted that in our response that they can show immediate harm if the liquidation is not stayed. But, *yes, the company ultimately will no longer exist.* That is what is contemplated under the liquidation statute in Title 45. . . . We're right now in the process, we yesterday, just yesterday finished a draft of a bid package that is supposed to go out after - - There are multiple motions that are being heard in Monday in Lewis County Chancery Court. After those motions have been heard, the plan is to send that bid package out. It goes out to a list of banks and other trust companies to say, first, it's got a confidentiality provision to it, requires them to keep whatever information they get confidential. Gives them basic information and has them come in within a two week time period to do their due diligence, and the contemplation is that by the end of September, first of October, we would have a bid that we would be able to accept that would transfer, our hope is to transfer all of the nondefaulted bond issues in one package." From Transcripts Excerpts, Complaint, Ex. D, pp. 2-4; emphasis added.)

be stretched to that extreme. When such occurs, without the official even arguably trying to demonstrate that the statute's plain language can be applied beyond the clear scope of its wording,<sup>2</sup> then there is a mere pretense of legality, or "colorable" authority. This is the very core meaning of that amendment's Due Process Clause. This was held in a judicial demonstration that the multiple protections of due process of law "come to us from the law of England . . . [and] were deemed to be equivalent to 'the law of the land.' " Further: "The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." and "'they do not mean to leave room for the play and action of purely personal and arbitrary power.' " *Dent v. West Virginia*, 129 U.S. 114, 123-124, 9 S. Ct. 231, 234, 32 L. Ed. 623, 626 (1889), whose continuing vitality is reaffirmed by *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

When careful, rational analysis of a statute's language cannot demonstrate that it grants the power claimed by the official, then the decision of the official's mind can only *purely personal and arbitrary*. Statutory empowerment to seize and liquidate a **bank** can't be read as empowering Defendant to seize a trust company, a savings and loan association, or a credit union. If the word "bank" has been amended to mean "bank or trust company," this amendment cannot be demonstrated except by construing the statute, which requires application of the law of statutory construction.

The necessity of a fair hearing before final deprivation of property requires such hearing to be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62, 66 (1965), holding an adoption decree lacking in due process where the parent on his first appearance in court, faced the "task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge." The Court held

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<sup>2</sup>The plain, common-sense difference between "bank" and "trust company" is so glaring as to be indisputable. A bank's huge cash common fund is its own money borrowed from depositors, each of whom has the right to "withdraw" the entire amount tomorrow, so that when there is a large cash deficit in this fund, the bank itself is in hazardous condition because it can't meet its debts due tomorrow. An indenture bond trust company's huge cash common fund is entirely the money of bond issuers and bond holders, never withdrawable by bondholders upon demand, but to be paid out only at fixed semi-annual dates throughout the year, so that a temporary shortage—even of long duration—is never fatal unless a liquidity problem occurs beyond the company's ability to meet through its own assets or by obtaining a bank loan.

such parent's rights could have been protected "only by granting his motion to set aside the decree and consider the case anew."

While that case involved mainly notice, the hearing itself was required to be a meaningful one adequate actually to protect the citizen's rights, there personal rights rather than property rights. The only hearing in this case was on a motion for an unappealable interlocutory order, which was rendered without the memorandum decision's resort to the only body of governing law, that of statutory construction. With an interlocutory appeal rejected by the Court of Appeals, there is no possibility of appellate review except by trial of the *certiorari* on its merits, followed by appeal of right<sup>3</sup> if there be an adverse decision, with possible discretionary review by the Supreme Court of Tennessee or by the United States Supreme Court. The property will have been sold and Sentinel effectively destroyed before the exhaustion of even trial court jurisdiction. But as the complaint alleges, the trial court simply refused to apply the law of statutory construction, relying entirely on one section which subjected trust companies to the Banking Act,<sup>4</sup> while Tennessee law of statutory construction, as does Federal law, forbids concentrating on merely one of many statutory provisions to construe the entire statute, when both the amendatory statute and the statute being amended contain other provisions on that same subject. Government by the "law of the land," as noted in *Dent v. West Virginia, supra*, is unattainable and due process is denied if a state Court refuses to apply the only body of law prescribed for arriving at a decision in accordance with law, particularly when this defective decisional process is utilized in a merely interlocutory order, but upon one of the two principal points<sup>5</sup> to be determined by the same judge on the merits of the *certiorari* review.

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<sup>3</sup>To achieve such appeal of right requires not only trial delay, but specific times allowed for transmission of the record and briefing by each party.

<sup>4</sup>Complaint, p. 15., referring to the section which subjected previously-exempt trust company to that Act, T.C.A. § 45-1-124(b), providing, in part, "Unless the commissioner determines otherwise, the provisions of chapters 1 and 2 of this title, and the rules thereof, shall also apply to the operation and regulation of state trust companies and banks whose purposes and powers are limited to fiduciary purposes and powers."

<sup>5</sup>These points being the statutory construction issue and expert testimony that the assumption of insolvency was without basis. This, and much greater detail, is shown by the Whisenant Affidavit filed with the complaint, stating in part: "I have examined the identified financial reports, and they, together with the facts assumed by the Commissioner, present no basis for concluding that Sentinel was insolvent on the date the Commissioner seized Sentinel

The deprivation might not be so certain and so striking had the Supreme Court of Tennessee not already held that because state department-heads have no power other than that granted by statute,<sup>6</sup> and that a state commissioner was not vested with the power to compel merger and therefore destruction of a company, appeal on *certiorari* was moot because its remedy could not reconstitute the past, *Boyce v. Williams, Commissioner of Insurance and Banking*, 215 Tenn. 704; 389 S.W.2d 272 (Tenn., 1965). In *Madison Loan & Thrift v. Neff, Commissioner*, 648 S.W.2d 655 (Tenn.App., M.S., 1982), the Tennessee Court of Appeals applied the same rule of statutory construction, to the predecessor of the same office, that of the commissioner regulating banks, holding the office had no powers not specifically granted by statute:

“‘Administrative agencies have only such power as is granted them by statute, and any action which is not authorized by the statutes is a nullity.’ *General Portland, Inc. v. Chattanooga-Hamilton County Air Pollution Control Board*, 560 S.W.2d 910, 913 (Tenn. App. 1976).

“It is a general rule that no intent may be imputed to the legislature in the enactment of a statute other than such as is supported by the face of the statute itself. *City of Nashville v. Kizer*, 194 Tenn. 357, 364, 250 S.W.2d 562, 565 (1952). This rule likewise applies in determining the power of an administrative agency. *Williams v. American Plan Corp.*, 216 Tenn. 435, 443, 392 S.W.2d 920, 924 (1965).”

(648 S.W.2d, at p. 657)

Unless this Court shall use its injunctive powers, as contemplated by the statute, to prevent the destruction of Sentinel's property, then it will inevitably be destroyed in the

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Trust Company, because the written undertaking to the Commissioner had not become due and could not be determinable until after completion of all liquidation litigation against the defaulted bond issuers. . . . Aside from the shortages in trust funds, resulting from the defaults of bond issuers, and from Sentinel's "borrowing" of these funds to carry out its liquidation obligations under the various bond indentures, the financial statements do not reveal any basis for concluding Sentinel itself was insolvent as of the date of seizure, May 18, 2004. (Affidavit, p. 4, ¶ 8).

<sup>6</sup>The Supreme Court stated therein:

“Moreover, our merger statutes do not empower the Commissioner with any such authority.

“‘The powers of the Commission must be found in the statutes. If they are not there, they are non-existent.’ *Tennessee-Carolina Transp. v. Pentecost*, 206 Tenn. 551, 334 S.W.2d 950 (1960).”

immediate future, although the assumption of its insolvency is false, as proven by the Whisenant affidavit based on the Commissioner's findings and on the financial reports the Commissioner had at his disposal, and the destruction will be final without any representative of Tennessee—either executive or judicial—demonstrating by recognized legal reasoning that a statutory power to seize a bank has become a power to seize an entirely different type of company.

There is no other possible remedy, and with the state judicial remedy, which should have been adequate, having failed for failure to expound and follow *any* legal theory established by judicial decisions, this Court should not only enjoin the Commissioner's illegal actions, but on final hearing, should apply well-established Tennessee law in its decision on the merits and restore Plaintiffs' property. Granting only the limited injunctive remedy to bar actual sale would leave the Commissioner in illegal possession while remitting Plaintiffs to the state remedy they are already following. Such delay would make far more difficult the task of saving customers and rebuilding the business to recover from the Commissioner's deadly attack. In diversity cases, Federal Courts constantly adjudicate state legal issues.

In seeking reconsideration or discretionary appeal following the Davidson County Chancery Court's denial of *supersedeas* to block the sale and restore possession, Plaintiffs respectfully pointed out to that Court that a statute which merely subjects a trust company to the provisions of the Banking Act, and which had a number of sections pertaining to trust companies, did not make it a bank or subject it to powers granted to the Commissioner only in relation to banks. To indicate the lack of complexity in discerning the meaning of the statute's plain language, part of that brief argument is repeated here, being based upon a restatement of those familiar principles in a recent holding by the Supreme Court of Tennessee in *Wilkins v. The Kellogg Company*, 48 S.W.3d 148 (Tenn., 2001), which included the following comments:

"[The] premise [that a statute be construed favorably to employees doesn't warrant a court's 'amendment, alteration or extension of its provisions beyond its obvious meaning'] is simply a specific application of the most basic rule of statutory construction: **courts must attempt to give effect to the legislative purpose and intent of a statute, as determined by the ordinary meaning of its text, rather than seek to alter or amend it.**" (48 S.W.3d at 152; emphasis added). This prohibits judicial amendment of a statute by changing "bank" to mean "bank or trust company," and equally prohibits drawing legislative intent from other than the body of the statute, absent clear ambiguity. Repeated statements that the Commissioner is empowered to do destructive acts to state banks furnish no basis for *de facto* judicial amendment adding trust companies to that term, especially when the statute elsewhere defines the word "bank" as including "trust company" for some sections but for none other.

**"In attempting to accomplish this goal [of statutory construction], courts must keep in mind that the 'legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose.'** Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000). 'Consequently, where the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject.' Id." (*Ibid.*; emphasis added). So when the Legislature says<sup>7</sup> that the Commissioner's powers over **trust companies** should include the one specified power of examination for a limited and

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<sup>7</sup>The 1999 Amendment, which brought Sentinel and other previously-exempted trust companies under the Banking Act, contained a provision codified in T.C.A. 45-1-124(h), provided a period for the newly-subjected companies to adjust "but such period shall not exceed three (3) years from July 1, 1999, followed immediately by a power-granting provision: "During this period of time, to conform to the requirements of chapters 1 and 2 of this title, *the commissioner may conduct examinations at such company's expense, and apply the requirements of chapters 1 and 2 of this title as deemed appropriate.*" (Emphasis added).

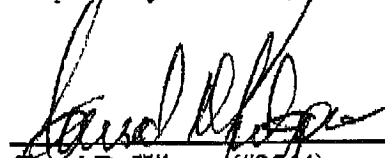
defined 3-year period, it is rationally impermissible to conclude that this expresses a grant not only of the examining power, but of all other banking-related powers to be freely and perpetually exercised over non-depository trust companies.

The inexorable passage of time, coupled with the speed of the Commissioner's planned action, not to mention the damage he has already done by holding Plaintiffs out of possession of their business, will lead to the inevitable destructive taking of this company without due process of law, without justification under the "law of the land" which is at the heart of due process, and without any compensation, and the successful consummation of seizure without warrant or probable cause unless this Court shall prevent by the issuance of a restraining order and injunction.

Wherefore, it is respectfully submitted that the Court should issue a Temporary Restraining Order and set the matter for an expedited hearing on the application for a preliminary injunction. The violation of U. S. Constitutional absolutes appears so clear that Plaintiffs suggest that a restraining order of brief duration is appropriate without prior hearing, because the same argument would pertain to a preliminary injunction.

However, as suggested by the prayers, if oral argument is deemed needful by the Court, or requested by the Attorney-General, Plaintiff's counsel is ready and eager to present argument for restraining order purposes no less than for preliminary injunction.

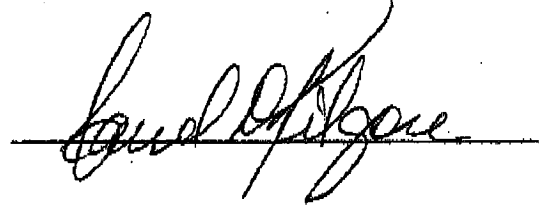
Respectfully submitted,



Carol D. Kilgore (#2574)  
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(615) 254-8801, Attorney for Plaintiffs

**Certificate of Service**

It is hereby certified that on this September 16, 2004, a copy of the foregoing brief has been delivered to the offices of JANET M. KLEINFELTER, ESQ., Senior Counsel, Financial Division, Attorney-General of Tennessee, 425 Fifth Avenue, North, Nashville, Tennessee 37243.

A handwritten signature in cursive script, appearing to read "David D. Gilgore", is written over a horizontal line.